

Private Computer Searches and the Fourth Amendment

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I. INTRODUCTION

On April 22, 2013, the user of the AOL account plains66952 attempted to email zoefeather@riseup.net.¹ AOL, which scans the hash values of emails against a database of hash values of known child pornography images, flagged the email as a potential match. AOL immediately terminated the account and forwarded a report about the hash value match to the nonprofit National Center of Missing and Exploited Children (NCMEC).² After reviewing the email and confirming that it appeared to contain child pornography, NCMEC made the report available to state police in Kansas, where the AOL account subscriber appeared to be located.³

Law enforcement obtained a warrant to search the home of the AOL subscriber, Walter Ackerman, and after further investigation, charged him with distribution and possession of child pornography. Ackerman moved to suppress the emails and other evidence, arguing that the initial scan of his email by AOL and review by NCMEC violated his Fourth Amendment rights by conducting a warrantless search of his email. The district court denied the motion. Applying reasoning consistent with other similar challenges to NCMEC's investigations, the Court concluded that neither AOL nor NCMEC are government entities or agents of the government.⁴ Therefore, the Court concluded, the Fourth Amendment does not apply to AOL and NCMEC.⁵

Ackerman appealed, and the United States Court of Appeals for the Tenth Circuit reversed.⁶ In an August 2016 opinion, then-Judge Neil Gorsuch wrote that NCMEC qualifies *both* as a government entity⁷ and as an agent of the government.⁸ The ruling received a great

¹ United States v. Ackerman, No. 13-10176-01-EFM, 2014 WL 2968164, at 8 (D. Kan. July 1, 2014).

² *Id.*

³ *Id.* at 9.

⁴ *Id.* at 21.

⁵ *Id.*

⁶ United States v. Ackerman, 831 F.3d 1292, 1309 (10th Cir. 2016).

⁷ *Id.* at 1298-99.

⁸ *Id.* at 1304.

deal of attention, not only because President Trump nominated Gorsuch to the United States Supreme Court only months later,⁹ but because the ruling threatened the underpinnings of a successful anti-child pornography program that NCMEC has operated for more than a decade.¹⁰

Ackerman's case, discussed more fully in Part III.A of this Article, reveals an increasingly difficult Fourth Amendment dilemma that courts have faced in recent years: when is a private party's search subject to the Fourth Amendment's protections? In other words, should Fourth Amendment protections apply to online service providers such as AOL and nonprofits such as NCMEC? What about computer repair store employees who incidentally discover illegal content while fixing a customer's computer?

The answers to those questions can determine whether the government can introduce sufficient evidence to convict a criminal defendant. The Fourth Amendment agency issue is particularly important in computer child pornography cases, in which a private party – such as an online service provider or computer repair technician – initially discovers evidence and alerts police. Indeed, a defendant who otherwise would face years or decades in prison may avoid any punishment by convincing a court that the private party that initially discovered the child pornography files was a government agent or instrument.

To decide whether a private party is a government agent – and therefore subject to the Fourth Amendment – courts look at a number of factors, including whether the government instigated the search,¹¹ whether the government acquiesced to the search,¹² and whether the

⁹ Jeffrey Rosen, *Neil Gorsuch: A Jeffersonian for the Supreme Court*, THE ATLANTIC (Feb. 1, 2017), <https://www.theatlantic.com/politics/archive/2017/02/a-jeffersonian-on-the-supreme-court/515319/> [<https://perma.cc/RF8T-AXG3>] (“Gorsuch’s willingness to side, twice, with suspected child pornographers is vivid evidence of his willingness to enforce the Fourth Amendment wherever it leads.”).

¹⁰ See Lance J. Rogers, *Nonprofit Agency Acted as Gov’t Agent in Opening E-Mail*, BLOOMBERG BNA (Aug. 10, 2016), <https://www.bna.com/nonprofit-agency-acted-n73014446133/> [<https://perma.cc/C4UL-TJSC>] (reporting that Yiota Souras, senior vice president and general counsel for NCMEC, stated that NCMEC “is still studying the decision to figure out what practical implications the decision carries for the way NCMEC operates.”).

¹¹ *United States v. Pervaz*, 118 F.3d 1, 6 (1st Cir. 1997).

¹² *United States v. Walther*, 652 F.2d 788, 791-92 (9th Cir. 1981).

private party intended to assist the government or whether the private party conducted the search to advance its own interests.¹³

This Article argues that courts should rework their Fourth Amendment agency tests to focus on the objective actions of both the government and private parties, rather than attempting to guess the intent of private parties. Part I of this Article traces the evolution of the doctrinal tests that courts have developed to determine whether a private party is an instrument or agent of the government and therefore subject to the Fourth Amendment. The U.S. Supreme Court has only addressed Fourth Amendment agency a few times, and it has provided broad guidelines for determining whether a private party is a government agent, focusing primarily on the government's actual involvement in the search. The federal circuit courts have developed more specific agent-or-instrument tests that largely focus on the intent of the private party. I argue that the circuit courts' tests reach beyond the prevailing Supreme Court precedent by focusing too heavily on subjective factors.

Part II explains how the circuit courts' agent-or-instrument tests largely are inconsistent with Fourth Amendment jurisprudence and theory. First, a focus on the subjective intentions of the private parties is inconsistent with the Supreme Court's opinions regarding Fourth Amendment agency. Second, scholars and courts are increasingly reluctant to consider subjective factors when determining other Fourth Amendment issues, such as whether an individual had a reasonable expectation of privacy and whether the subject of a search provided valid consent.

Part III explores the practical problems with the application of the prevailing agent-or-instrument tests. To do so, the Article examines how the circuit courts' agent-or-instrument tests have been applied to computer crime cases, primarily criminal child pornography charges for which evidence was initially discovered by online service providers or computer repair technicians. The Article argues that the subjective components of Fourth Amendment agency tests are unworkable and lead to unpredictable and often conflicting results.

Part IV proposes a revised agency test that focuses on whether law enforcement controlled the private party's search. Under this new framework, a private party will be deemed an agent of the government for Fourth Amendment purposes if the government substantially participated in the private party's search. By objectively assessing the

¹³ *Id.*

government's actions – rather than the multifaceted subjective reasoning of the private party – courts would provide an agency framework that is more consistent with the Fourth Amendment and predictable for private parties.

II. OVERVIEW OF FOURTH AMENDMENT AGENCY LAW

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁴

The Fourth Amendment, therefore, has two primary requirements: that searches and seizures be reasonable, and that warrants be supported by probable cause. Since the nation's founding, there has been extensive academic debate as to precisely what the Founders intended with the Amendment.¹⁵ But there is little debate that it stemmed from a concern of the government's abuse of power. In 1789, James Madison wrote:

It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent . . . ; because in the Constitution of the United States, there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the Government of the United States, or in any department

¹⁴ U.S. CONST. amend. IV.

¹⁵ See Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 983 (2011) ("Historical analysis remains a fundamentally important tool to interpret the words of the Fourth Amendment. Despite its crucial role, there is no consensus regarding the details or meaning of the historical record.").

or officer thereof; this enables them to fulfil every purpose for which the Government was established.¹⁶

Despite the continued debate as to the requirements of the Fourth Amendment, there is little debate that it applies to government agencies such as local police and the Federal Bureau of Investigation. The more difficult question, however, is when the Fourth Amendment applies to the actions of a private party that works with the government and provides evidence that is later used against someone in a criminal prosecution.

The Supreme Court long has ruled that the Fourth Amendment's restrictions may bind a private party if it is an agent or instrumentality of the government. However, the few rulings to address those issues have provided little concrete direction as to how courts should determine whether the private party is an agent or instrumentality. Although the Supreme Court cases leave room for both objective and subjective factors, they have not expressed a single test, and many of the opinions have tilted toward objective analyses. Federal circuit courts have formulated their own tests to fill that gap.

A. Supreme Court Private Search Doctrine

A 1921 opinion, *Burdeau v. McDowell*,¹⁷ was the first Supreme Court case to address whether the Fourth Amendment applies to searches conducted by private parties. In that case, an officer of an oil and gas holding company searched the private office of one of its employees, J.C. McDowell, took various papers from the office desk and safe, and later provided the documents to federal prosecutors.¹⁸ Prosecutors planned to charge McDowell with mail fraud, and McDowell challenged the search on Fourth Amendment grounds.¹⁹ The district court agreed and suppressed the evidence, but the Supreme Court reversed. Writing for the majority, Justice Day reasoned that the Fourth Amendment historically applied to

¹⁶ James Madison, *Speech at the First Congress, First Session: Amendments to the Constitution (June 8, 1789)*, in 5 WRITINGS OF JAMES MADISON 383 (Gaillard Hunt, ed., 1904).

¹⁷ *Burdeau v. McDowell*, 256 U.S. 465 (1921).

¹⁸ *Id.* at 473-74.

¹⁹ *Id.* at 470.

government action, and that “[i]ts origins and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies.”²⁰ The Fourth Amendment did not require suppression of the evidence gathered by McDowell’s employer, Justice Day reasoned, because no federal government official “had anything to do with the wrongful seizure” of McDowell’s property,²¹ and “[i]t is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another.”²² Although Justice Day recognized that McDowell had “an unquestionable right of redress against those who illegally and wrongfully took his private property,” those remedies were against the private actors and not the federal government.²³

In dissent, Justice Brandeis, joined by Justice Holmes, noted that the government planned to use stolen documents against McDowell.²⁴ Justice Brandeis recognized that it “may be true” that the government could have obtained the documents via subpoena, and that the Constitution does not require the return of the documents.²⁵ Despite the likely constitutionality of the actions, Justice Brandeis wrote that he “cannot believe” that such actions are lawful.²⁶ “At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen,” Justice Brandeis wrote.²⁷ Nonetheless, federal and state law enforcement have since referred to the “*Burdeau* rule” for the

²⁰ *Id.* at 475.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 476 (Brandeis, J., dissenting).

²⁵ *Id.* at 477.

²⁶ *Id.*

²⁷ *Id.*

principle that the Fourth Amendment does not apply to the actions of private parties.²⁸

The private search issue in the *Burdeau* case was relatively simple, as it involved a private party acting entirely independently of the government. The more difficult question arises when a search is conducted on behalf of the government. This issue first arose five years after *Burdeau*, in *Gambino v. United States*.²⁹ The Supreme Court considered, in a federal prosecution under the National Prohibition Act, the denial of a motion to suppress evidence that state troopers collected when they searched an automobile.³⁰ (The Fourth Amendment did not automatically apply to state troopers at the time because the search occurred more than three decades before the Supreme Court incorporated the Fourth Amendment to states).³¹ Writing for a unanimous Supreme Court, Justice Brandeis reversed the denial of the suppression motion.³² Even though the arrest and seizure of evidence was not conducted under the direction of the federal government, Justice Brandeis reasoned, Fourth Amendment rights “may be invaded as effectively by such cooperation, as by the state officers’ acting under direction of the federal officials.”³³ *Burdeau* was different, Justice Brandeis concluded, because it did not “appear that the search and seizure was made solely for the purpose of aiding the United States in the enforcement of its laws.”³⁴ This statement indicates that Brandeis believed that *Burdeau* used a subjective element in its analysis, though that is not supported by the text of the *Burdeau* majority opinion.

Gambino was a relatively limited holding that dealt with one government official acting as an agent of another government entity. The Supreme Court first addressed whether a *private* party could be an agent or instrumentality of the government for Fourth Amendment

²⁸ See Austin A. Andersen, *The Admissibility of Evidence Located in Searches by Private Persons*, 58 FBI L. ENFORCEMENT BULL. 25, 26 (May 1989).

²⁹ *Gambino v. United States*, 275 U.S. 310 (1927).

³⁰ *Id.* at 312-13.

³¹ *Mapp v. Ohio*, 367 U.S. 643 (1961).

³² *Gambino*, 275 U.S. at 319.

³³ *Id.* at 316.

³⁴ *Id.* at 317.

purposes in 1971. In *Coolidge v. New Hampshire*,³⁵ the defendant in a murder case raised a variety of Fourth Amendment objections related to evidence presented against him at trial. Relevant to the agency issue was the government's introduction of guns and a hunting jacket that the defendant's wife provided to the officers when they visited her at home.³⁶ The police asked whether her husband owned any guns, and she replied, "Yes, I will get them in the bedroom."³⁷ Once she retrieved the guns, she asked whether the officers wanted the guns, and they responded that they would like them.³⁸ Justice Stewart, writing for the majority, rejected the defendant's claim that the wife acted as an "instrument" of the government. Justice Stewart acknowledged that spouses often are compelled to cooperate with police due to "the simple but often powerful convention of openness and honesty, the fear that secretive behavior will intensify suspicion, and uncertainty as to what course is most likely to be helpful to the absent spouse."³⁹ However, Justice Stewart concluded that the Fourth Amendment's exclusionary rule was created to prevent official misconduct, and is not intended "to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals."⁴⁰ Justice Stewart did not articulate a particular test to determine whether a private party acts as a government agent or instrument; rather, he stated that the analysis must consider "all of the circumstances of the case."⁴¹ Of course, "all" of the circumstances could include subjective elements as well as objective elements, but the Court did not state as such.

Relying on *Coolidge*, the Supreme Court in 1984 reversed the suppression of cocaine that Federal Express employees discovered through a search of a suspicious package, even though Federal Express employees later provided the materials to a federal agent for

³⁵ *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

³⁶ *Id.* at 486.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 488.

⁴⁰ *Id.*

⁴¹ *Id.* at 487.

chemical testing.⁴² In *United States v. Jacobsen*, Justice Stevens wrote that the defendants “could have no privacy interest in the contents of the package, since it remained unsealed and since the Federal Express employees had just examined the package and had, of their own accord, invited the federal agent to their offices for the express purpose of viewing its contents.”⁴³ Dissenting, Justice White lamented that the majority “excessively expands” *Burdeau* and *Coolidge* by declaring “that governmental inspections following on the heels of private searches are not searches at all as long as the police do no more than the private parties have already done.”⁴⁴

The Supreme Court has held that private parties can be government agents or instruments with sufficient government involvement in and encouragement of the searches. In a 1989 case, *Skinner v. Railway Labor Executives' Ass'n.*,⁴⁵ the Supreme Court held that private railroads are agents or instruments of the government when they administer drug or alcohol tests under regulations promulgated by the Federal Railroad Administration.⁴⁶ The regulation allows railroads, at their discretion, to order breath or urine drug tests in certain circumstances, such as after a reportable accident.⁴⁷ Railroad and labor organizations argued that the regulations violate the employees' Fourth Amendment rights by allowing compelled drug and alcohol testing without a warrant.⁴⁸ In defense of the regulation, the government argued that the Fourth Amendment does not apply because the regulation does not require the private railroads to conduct drug and alcohol tests; such testing is entirely discretionary.⁴⁹ Writing for the majority, Justice Kennedy disagreed with the government, concluding that “[t]he fact that the Government has compelled a private party to perform a search does

⁴² *United States v. Jacobsen*, 466 U.S. 109 (1984).

⁴³ *Id.* at 119.

⁴⁴ *Id.* at 129 (White, J., concurring).

⁴⁵ *Skinner v. Ry. Labor Execs.' Ass'n.*, 489 U.S. 602 (1989).

⁴⁶ *Id.* at 606.

⁴⁷ *Id.* at 611.

⁴⁸ *Id.* at 612.

⁴⁹ *Id.* at 614.

not, by itself, establish that the search is a private one.”⁵⁰ Justice Kennedy wrote that a few facts led to the conclusion that “the Government did more than adopt a passive position toward the underlying private conduct.”⁵¹ These features of the regulations included:

- Preempting state laws covering the same topic;⁵²
- Superseding collective bargaining agreements;⁵³
- Providing the Federal Railroad Administration with the ability to receive biological samples or test results;⁵⁴
- Prohibiting railroads from signing contracts that divest themselves of the right to conduct tests under the regulation;⁵⁵ and
- Prohibiting employees from declining their employers’ request to submit to drug testing under the regulation.⁵⁶

Taken together, Justice Kennedy wrote, these facts demonstrate that the Government has “removed all legal barriers” to drug and alcohol testing and expressed a strong desire for the testing to occur.⁵⁷ “These are clear indices of the Government’s encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment.”⁵⁸

Lower court decisions frequently cite *Skinner* regarding Fourth Amendment agency, as it is the most specific articulation of the analytical framework to determine whether a private party is a government agent or instrument. Consistent with earlier Supreme Court rulings, *Skinner* focuses on the actions of the state: whether the government encouraged, endorsed, or participated in the private party search.

⁵⁰ *Id.* at 615.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 615-16.

B. *Lower Court Agent-or-Instrument Analysis*

Because the Supreme Court has only articulated high-level principles for agency analysis, lower courts have developed their own tests to determine whether private parties are government agents or instruments. Largely, these tests go far beyond the focus on the actions of the government, which the Supreme Court has indicated is central to the analysis. Instead, the lower courts place far more emphasis on the state of mind of the private actor.

As the Supreme Court developed its agency doctrine, circuit courts operated on a parallel track, adopting their own tests that were based largely on previous case law from their circuit. The test adopted in most of the circuits can be traced back to a Ninth Circuit case, *United States v. Walther*,⁵⁹ which was issued in 1981. In *Walther*, the federal government unsuccessfully appealed the district court's suppression of drugs that an airline employee discovered in an overnight case in the airline's baggage terminal.⁶⁰ On appeal, the government argued that the airline employee did not act as an instrument or agent of the government.⁶¹ The Ninth Circuit recognized that the case existed in a "gray area" that was between "the extremes of overt governmental participation in a search and the complete absence of such participation."⁶² Determining whether a private party in this "gray area" is a government agent or instrument requires the "consistent application of certain general principles," the Court stated.⁶³ To derive these principles, the Ninth Circuit relied on a series of its decisions from the 1960s and 1970s, some of which predated not only *Jacobsen* and *Skinner*, but also *Coolidge*:

Prior case law indicates the wide variety of factual situations to which these principles might be applied. A search made by airline employees pursuant to a federal anti-hijacking program may be considered a governmental search where the employee's actions fall

⁵⁹ *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981).

⁶⁰ *Id.* at 790.

⁶¹ *Id.* at 791.

⁶² *Id.*

⁶³ *Id.*

within the federal guidelines. On the other hand, an airline employee's search of a passenger's luggage which exceeds the guidelines of the hijacking program may be regarded as a private search. Mere governmental authorization of a particular type of private search in the absence of more active participation or encouragement is similarly insufficient to require the application of fourth amendment standards.

The presence of law enforcement officers who do not take an active role in encouraging or assisting an otherwise private search has been held insufficient to implicate fourth amendment interests, especially where the private party has had a legitimate independent motivation for conducting the search. In *United States v. Gomez* . . . this court ruled that the opening of a suitcase by an airline employee which apparently had been misplaced was a private search even though a county detective physically carried the suitcase to the employee's working area because of the airline's legitimate interest in identifying the owner of the luggage. In the same vein is *United States v. Humphrey*, . . . wherein the airline's interest in preventing fraudulent loss claims rendered an employee's search of an obviously damaged package private even though a police officer had suggested prior to the search that it would be a "good idea" to open the package. A search by a freight carrier, however, may be classified as governmental intrusion where carrier's employee engages in the search for the sole purpose of assisting the government.⁶⁴

⁶⁴ *Id.* at 791-92 (citations omitted from text) (citing *United States v. Canada*, 527 F.2d 1374 (9th Cir. 1975); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973); *United States v. Ogden*, 485 F.2d 536 (9th Cir. 1973); *United States v. Goldstein*, 532 F.2d 1305 (9th Cir. 1976); *United States v. Stevens*, 601 F.2d 1075 (9th Cir. 1979); *United States v. Gomez*, 614 F.2d 643 (9th Cir. 1979); *United States v. Humphrey*, 549 F.2d 650 (9th Cir. 1977); *Gold v. United States*, 378 F.2d 588 (9th Cir. 1967); *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966) (en banc)).

Based on these previous cases, the Ninth Circuit in *Walther* distilled the two “critical factors” for the agency analysis: “(1) the government's knowledge and acquiescence, and (2) the intent of the party performing the search.”⁶⁵ The Second,⁶⁶ Fourth,⁶⁷ Fifth,⁶⁸ Sixth,⁶⁹ and Eleventh⁷⁰ Circuits have all adopted this framework. The Third Circuit has not articulated an analytical framework, but a bankruptcy court within the circuit adopted *Walther*.⁷¹ The Seventh and Eighth Circuits’ analyses rely on the two *Walther* factors, as well as (1) whether the private party’s search was in response to a government request, and (2) whether the search was conducted in response to a reward offer by the government.⁷² Similarly, in addition to the two *Walther* factors, the Tenth Circuit requires a finding that the government “must also affirmatively encourage, initiate or instigate the private action.”⁷³

The First Circuit has strayed the furthest from *Walther*, concluding that “any specific ‘standard’ or ‘test’ is likely to be oversimplified or too general to be of help.”⁷⁴ Instead, the First Circuit stated that it may consider, depending on the specific circumstances, the following factors: “the extent of the government's role in instigating or participating in the search, its intent and the degree of control it exercises over the search and the private party, and the extent to which the private party aims primarily to help the government or to serve its own interests.”⁷⁵

⁶⁵ *Walther*, 652 F.2d at 792.

⁶⁶ *United States v. Bennett*, 709 F.2d 803, 805 (2d Cir. 1983).

⁶⁷ *United States v. Jarrett*, 338 F.3d 339, 344 (4th Cir. 2003).

⁶⁸ *United States v. Paige*, 136 F.3d 1012, 1017 (5th Cir. 1998).

⁶⁹ *United States v. Bowers*, 594 F.3d 522, 525-26 (6th Cir. 2010).

⁷⁰ *United States v. Steiger*, 318 F.3d 1039, 1045 (11th Cir. 2003).

⁷¹ *In re Bursztyn*, 366 B.R. 353, 367 (Bankr. D.N.J. 2007).

⁷² *United States v. Koenig*, 856 F.2d 843, 847 (7th Cir. 1998); *United States v. Malbrough*, 922 F.2d 458, 462 (8th Cir. 1990).

⁷³ *United States v. Smythe*, 84 F.3d 1240, 1243 (10th Cir. 1996).

⁷⁴ *United States v. Pervaz*, 118 F.3d 1, 6 (1st Cir. 1997).

⁷⁵ *Id.*

Although the circuit tests differ slightly, they share a common thread: a strong focus on the subjective intent of the private party at the time of the initial search.

III. SUBJECTIVE AGENCY TESTS ARE INCONSISTENT WITH THE FOURTH AMENDMENT

The circuit court tests for agent-or-instrument status focus largely on the motivations of the private actors and, to a lesser extent, the knowledge of the government. This is incorrect as a matter of Fourth Amendment law for two reasons. First, the circuit courts' focus on private party intent is not entirely supported by the principles outlined in the few Supreme Court cases that have addressed the agent-or-instrument issue. Second, the continued focus on the intent of private parties is contrary to many other areas of the Fourth Amendment, such as whether police behaved reasonably or whether a defendant had a reasonable expectation of privacy, in which courts have moved away from attempting to delve into the state of mind of an individual, and instead assess the objective circumstances surrounding a Fourth Amendment violation.

A. Intent-Based Agency Tests are Inconsistent with Supreme Court Precedent

Although the United States Supreme Court has not articulated a specific test for Fourth Amendment agency, it has articulated general principles in the agency cases described in Part I.A. Those principles are not consistent with the *Walther* test and its analogues in other circuits.

To determine whether a private party acted as a government agent, the Supreme Court generally has focused on the control that the government has exerted over the private party's search. For instance, in *Jacobsen*, the Supreme Court partly based its conclusion that Federal Express was not an agent because Federal Express employees examined the package and invited law enforcement "of their own accord."⁷⁶ The *intent* of the Federal Express employees at the time of the search was immaterial to this conclusion. Indeed, the mere fact that the Federal Express employees quickly invited law enforcement

⁷⁶ United States v. *Jacobsen*, 466 U.S. 109, 119 (1984).

to inspect the package could indicate that the employees intended to help the government.

Likewise, in *Skinner*, which is the Supreme Court's most expansive articulation of Fourth Amendment private party doctrine, the Court explicitly stated that the determination of agency status "necessarily turns on the degree of the Government's participation in the private party's activities."⁷⁷ The Court's ultimate conclusion that the railroads were government agents rested on the actions of the government, which through its regulations greatly assisted the railroads' drug testing by preempting state laws, superseding collective bargaining agreements, and prohibiting employees from declining requests for testing. Key to the Court's agency conclusion was that the Government "did more than adopt a passive position toward the underlying private conduct."⁷⁸ This highlights two important flaws in the agent-or-instrument tests applied by circuit courts.

First, the *Skinner* court did not focus on the intent of the railroads in conducting the drug tests. Indeed, the railroads had complete discretion as to whether to conduct the test. Deciding to require drug testing could raise a number of questions about whether the railroads' intended to help law enforcement, but this did not factor into the Supreme Court's analysis.

Second, the Supreme Court's focus on the fact that the government took more than a "passive position" contradicts the first prong of the *Walther* test, which inquires only into whether the government knew of and acquiesced to the private party's search. Mere knowledge and acquiescence should not be the focus of the agency inquiry, according to the Supreme Court in *Skinner*. Instead, agency requires some level of active encouragement or participation by the government in the private party's search.⁷⁹ The *Walther* test simply ignores that distinction.

The disconnect between the Supreme Court's agency holdings and the circuit court tests could be attributed, at least in part, to the Supreme Court's lack of specificity when it articulated the general

⁷⁷ *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 614 (1989).

⁷⁸ *Id.* at 615.

⁷⁹ See LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT ch.1, § 1.8(b) (1996) ("[E]ven when the physical act of searching is by a private person, it may generally be said that the search is still governmental action if it is instigated by the authorities or the authorities have participated in the search in some way.").

rules for Fourth Amendment agency. The Ninth Circuit's *Walther* opinion, which has shaped the agent-or-instrument tests in every other circuit, was issued in 1981, three years before *Jacobsen* and eight years before *Skinner*. Moreover, to develop the *Walther* test, the Ninth Circuit drew on fact patterns and holdings from cases that it decided in the 1960s and 1970s. At the time that the Ninth Circuit developed the *Walther* test, it was not necessarily inconsistent with Supreme Court precedent because *Skinner* and *Jacobsen* had not yet been issued. And *Jacobsen* and *Skinner* did not set forth specific factors for courts to weigh in determining agency status, the lower courts continued to adopt their own versions of *Walther*. The result of this parallel development of circuit court agency tests, however, has led to lower court rulings that are inconsistent with the Fourth Amendment principles articulated by the Supreme Court.

B. Fourth Amendment Law Discourages Subjective Inquiries

The *Walther* test for agent-or-instrument status is contrary to a general trend in Fourth Amendment law that discourages inquiries into subjective intent, and instead focuses on objective analysis. Courts and commentators have discouraged the consideration of subjective intent in determining whether an individual has a reasonable expectation of privacy, assessing whether a search or seizure was reasonable, and evaluating whether an individual provided consent for a search.

The Supreme Court has rejected the use of subjective intent in determining whether a search or seizure was reasonable. In *Whren v. United States*,⁸⁰ the Supreme Court unanimously ruled that police could pull over a vehicle if the police had probable cause to believe that a traffic offense had occurred, regardless of the officer's subjective intent for the stop. "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," the Court wrote.⁸¹ Fourth Amendment case law forecloses "any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."⁸²

⁸⁰ *Whren v. United States*, 517 U.S. 806 (1996).

⁸¹ *Id.* at 813.

⁸² *Id.*

Recognizing that the Supreme Court would insist on an objective reasonableness test, the defendants in *Whren* argued that the court should evaluate “whether the officer’s conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given.”⁸³ The Court swiftly rejected this approach concluding that “although framed in empirical terms, this approach is plainly and indisputably driven by subjective considerations.”⁸⁴ In 2001, the Supreme Court extended the prohibition on consideration of subjective intent beyond probable-cause searches, and held that it also applies to warrantless searches such as those of a probationer.⁸⁵ Tracing the history of Fourth Amendment reasonableness cases, George E. Dix concluded that the Supreme Court “has increasingly used language suggesting that Fourth Amendment standards are entirely objective ones that give no significance to the state of minds of the officers whose actions are under analysis.”⁸⁶

Courts also have rejected subjective inquiries when determining whether an individual has provided consent for law enforcement to conduct a search. In the seminal case on consent searches, *Schneckloth v. Bustamonte*,⁸⁷ the Supreme Court stated that determining whether an individual consented requires an analysis of the totality of the circumstances of the search, including the “possibly vulnerable subjective state of the person who consents.”⁸⁸ However, in practice, courts do not assess such subjective factors. A three-year study of consent cases found subjective considerations in “only a handful” of court opinions.⁸⁹ As one commentator described consent cases, “[w]henever confronted with a conflict between subjective

⁸³ *Id.* at 814.

⁸⁴ *Id.*

⁸⁵ *United States v. Knights*, 534 U.S. 112, 114 (2001).

⁸⁶ George E. Dix, *Subjective Intent as a Component of Fourth Amendment Reasonableness*, 76 MISS. L.J. 373 (2006).

⁸⁷ *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

⁸⁸ *Id.* at 229.

⁸⁹ Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 222 (2001).

intention and objective appearance, the Court has opted for an objective approach.”⁹⁰

When determining whether a Fourth Amendment search has occurred, courts look to *United States v. Katz*,⁹¹ a 1967 case in which the Supreme Court held that the Fourth Amendment applied to the government’s wiretapping of a criminal suspect’s conversation on a payphone because the individual had a reasonable expectation of privacy. To determine whether an individual has a reasonable expectation of privacy, courts look to Justice Harlan’s concurrence in *Katz*, in which he articulated a “twofold requirement” for Fourth Amendment protections: “first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”⁹² For instance, in 1979, the Supreme Court held that the Fourth Amendment does not require a warrant for law enforcement to install a pen register to obtain phone numbers that a criminal suspect has dialed.⁹³ In part, its conclusion rested on the lack of a subjective expectation of privacy in phone numbers, rather than content of communications. “Although subjective expectations cannot be scientifically gauged,” the Supreme Court acknowledged, “it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.”⁹⁴

Despite this relatively unambiguous requirement for a subjective prong, courts have gradually ignored the subjective component of the Harlan concurrence and focused on whether the expectation of privacy was reasonable. To be sure, courts still cite and quote both prongs of the Harlan concurrence, but their analysis typically rests only on the second prong. In a review of all 540 court opinions that applied *Katz* in 2012, Orin Kerr found that only 12 percent of the

⁹⁰ Alfair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 532 (2016).

⁹¹ *Katz v. United States*, 389 U.S. 347 (1967).

⁹² *Id.* at 361 (Harlan, J., concurring).

⁹³ *Smith v. Maryland*, 442 U.S. 735 (1979).

⁹⁴ *Id.* at 743.

opinions applied the subjective prong of *Katz*.⁹⁵ And of those 12 percent, none relied on the subjective prong for the ultimate outcome of the analysis.⁹⁶ Kerr attributes this to a gradual shift in interpretations of Harlan's concurrence. Kerr posits that Harlan's subjective inquiry "asked whether the individual took steps to make objectively protected spaces open to outside observation and thus yielded privacy rights against that invited observation"⁹⁷ but gradually was interpreted by courts to ask "whether the individual actually expected his information to remain private."⁹⁸ As a result, Kerr concluded, the subjective prong of *Katz* has become a "phantom doctrine."⁹⁹

IV. PRACTICAL DIFFICULTIES OF APPLYING AGENCY TESTS TO COMPUTER CRIME CASES

In addition to the inconsistencies with Fourth Amendment precedent and theory, the prevailing circuit court tests for Fourth Amendment agency are difficult to apply. The focus on subjective intent often leads to inconsistent and unpredictable results.

The *Walther*-based tests require a largely subjective inquiry into the minds of both the private party and the government. Courts examine whether the private party *intended* to assist law enforcement, or whether the private party intended to advance its own interests that are unrelated to law enforcement. Similarly, courts consider whether the government *knew* of the private party searches. Both inquiries require the courts to reconstruct an individual's mind at the time of the search. The only aspect of the *Walther* test that considers an individual's objective actions – rather than their intent or knowledge – is the examination of whether the government "acquiesced" to the private search. Notably, the *Walther* test does not examine whether the government did more than passively acquiesce; for instance, the

⁹⁵ Orin Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 114 (2014).

⁹⁶ *Id.*

⁹⁷ *Id.* at 126.

⁹⁸ *Id.* at 128.

⁹⁹ *Id.* at 133.

test does not look at any affirmative steps that the government took to encourage or aid the search.

This focus on the state of mind of private parties and the government leads to unpredictable results, and makes it difficult to determine with any certainty whether a private party's actions will be subject to the Fourth Amendment's restrictions on searches and seizures. This pragmatic difficulty is particularly acute in computer crime cases, as third parties often have access to files that an individual stores either locally on the individual's computer or remotely in an email or cloud storage account. This Part examines how courts have applied the Fourth Amendment in two types of cases: (1) automatic scanning by email and cloud storage providers that detects child pornography; and (2) incidental discovery of child pornography by computer repair technicians.

A. Email Account Scanning

When Internet service providers, email services, or cloud service providers detect child pornography on user accounts, prosecutors often seek to use the evidence that the companies obtained in criminal trials of the users. The Fourth Amendment may bar the presentation of that evidence, depending on how the court applies the agent-or-instrument test.

If U.S. online service providers obtain actual knowledge of a user's apparent violation of federal child pornography laws, they must file a report with the nonprofit National Center for Missing and Exploited Children (NCMEC), which processes the reports through its CyberTipline.¹⁰⁰ The report may include information about the subscriber, information about how the service provider discovered the apparent child pornography, the complete communication, and any image of apparent child pornography.¹⁰¹ Service providers face fines of

¹⁰⁰ 18 U.S.C. § 2258A(a) ("Whoever, while engaged in providing an electronic communication service or a remote computing service to the public through a facility or means of interstate or foreign commerce, obtains actual knowledge of [a child pornography violation] shall, as soon as reasonably possible— (A) provide to the CyberTipline of the National Center for Missing and Exploited Children, or any successor to the CyberTipline operated by such center, the mailing address, telephone number, facsimile number, electronic mail address of, and individual point of contact for, such electronic communication service provider or remote computing service provider; and (B) make a report of such facts or circumstances to the CyberTipline, or any successor to the CyberTipline operated by such center.").

¹⁰¹ 18 U.S.C. § 2258A(b).

up to \$300,000 for failing to file such a report with NCMEC.¹⁰² Service providers are immune from civil claims or criminal charges arising from their participation in the CyberTipline program, provided that they did not engage in intentional or reckless conduct.¹⁰³

Although federal law requires service providers to report actual knowledge of apparent child pornography, the law does not require that service providers take any affirmative actions to search for such illegal content. In fact, federal law explicitly states that service providers do not have such a duty.¹⁰⁴

NCMEC is required by statute to forward CyberTipline reports to federal law enforcement,¹⁰⁵ and is permitted to also share the reports with state or local law enforcement.¹⁰⁶ NCMEC is permitted – but not required – to provide service providers with information about known child pornography to prevent further distribution of the material.¹⁰⁷

¹⁰² 18 U.S.C. § 2258A(e).

¹⁰³ 18 U.S.C. § 2258B(a) (“Except as provided in subsection (b), a civil claim or criminal charge against an electronic communication service provider, a remote computing service provider, or domain [2] name registrar, including any director, officer, employee, or agent of such electronic communication service provider, remote computing service provider, or domain name registrar arising from the performance of the reporting or preservation responsibilities of such electronic communication service provider, remote computing service provider, or domain name registrar under this section, section 2258A, or section 2258C may not be brought in any Federal or State court.”); 18 U.S.C. § 2258B(b) (“Subsection (a) shall not apply to a claim if the electronic communication service provider, remote computing service provider, or domain name registrar, or a director, officer, employee, or agent of that electronic communication service provider, remote computing service provider, or domain name registrar— (1) engaged in intentional misconduct; or (2) acted, or failed to act— (A) with actual malice; (B) with reckless disregard to a substantial risk of causing physical injury without legal justification; or (C) for a purpose unrelated to the performance of any responsibility or function under this section,[3] sections 2258A, 2258C, 2702, or 2703.”).

¹⁰⁴ 18 U.S.C. § 2258A(f) (“Nothing in this section shall be construed to require an electronic communication service provider or a remote computing service provider to— (1) monitor any user, subscriber, or customer of that provider; (2) monitor the content of any communication of any person described in paragraph (1); or (3) affirmatively seek facts or circumstances described in sections (a) and (b).”).

¹⁰⁵ 18 U.S.C. § 2258A(c)(1).

¹⁰⁶ 18 U.S.C. § 2258A(c)(2).

¹⁰⁷ 18 U.S.C. § 2258C(a) (“The National Center for Missing and Exploited Children may provide elements relating to any apparent child pornography image of an identified child to an electronic communication service provider or a remote computing service provider for the sole and exclusive purpose of permitting that electronic communication service

Although they are not required to do so, many service providers voluntarily choose to scan email and other stored user content for child pornography. Two of the most common scanning programs are Image Detection and Filtering Process (IDFP) and PhotoDNA. Both programs automatically scan the numerical hash values user content and match it against a database of hash values of known child pornography images. The key difference between the two programs is the amount of human involvement. If IDFP detects a match to known child pornography, the service provider automatically diverts the email from the recipient's inbox, quarantines the email, and forwards it to NCMEC.¹⁰⁸ PhotoDNA, in contrast, looks for similarities between hash values of the user content and known child pornography, but does not necessarily require the image to be identical. Because of this broader sweep, the service provider's employee typically reviews the file before determining whether to forward it to NCMEC.¹⁰⁹

The specific methods and procedures that service providers use to detect child pornography determine how a court analyzes the Fourth Amendment implications of any evidence that is generated through the CyberTipline process. For instance, in *United States v. Drivdahl*,¹¹⁰ a criminal defendant moved to suppress child pornography that his service provider, Google, reported to NCMEC. Because Google's standard procedure was for a Google employee to open and review each flagged image, the court analyzed whether Google was a state actor.¹¹¹ Because any subsequent review of the image by NCMEC did not expand upon Google's search, NCMEC's government agent status was irrelevant to the Fourth Amendment analysis.¹¹² In contrast, in *United States v. Keith*,¹¹³ the Court analyzed the agency status of *both* AOL and NCMEC because AOL used IDFP

provider or remote computing service provider to stop the further transmission of images.”).

¹⁰⁸ *United States v. DiTomasso*, 56 F. Supp. 3d 584 (S.D.N.Y. 2014).

¹⁰⁹ *Id.*

¹¹⁰ *United States v. Drivdahl*, CR 13-18-H-DLC, 2014 U.S. Dist. LEXIS 29233 (D. Mont. Mar. 6, 2014).

¹¹¹ *Id.* at *7-10.

¹¹² *Id.* at *12.

¹¹³ *United States v. Keith*, 980 F. Supp. 2d 33 (D. Mass. 2014).

and therefore did not review the potential child pornography file before forwarding it to NCMEC.¹¹⁴ Therefore, the court analyzed two searches: AOL's automatic scanning of the email and NCMEC's opening of the email.¹¹⁵

Under the prevailing agent-or-instrument tests, courts may well reach different results depending on whether they are applying the tests to NCMEC or a service provider. That is because the tests place such a heavy emphasis on the subjective intent of the private parties conducting the searches. In *Keith*, the Court ruled that AOL was not a government agent or instrument because it "is motivated by its own wholly private interests in seeking to detect and deter the transmission of child pornography through its network facilities."¹¹⁶ Key to the Court's conclusion was testimony from an AOL representative, who stated in an evidentiary hearing:

We found that, again, providing a safer, more family-friendly environment for our users sustains our ability to keep our members. We've noticed when members call and say, "I want to discontinue my AOL service," we usually ask them why. And there are many reasons why somebody may want to leave, but one of these that we're routinely concerned about is objectionable content sent to them through our servers by other members or other Internet users. So they end up leaving AOL because of this bad content. So as a business, we would like to actually keep the members who complain about it and have a countermeasure against those who do it.¹¹⁷

¹¹⁴ *Id.* at 37.

¹¹⁵ *Id.* at 43 ("In this regard it is worth noting that matching the hash value of a file to a stored hash value is not the virtual equivalent of viewing the contents of the file. What the match says is that the two files are identical; it does not itself convey any information about the contents of the file. It does say that the suspect file is identical to a file that someone, sometime, identified as containing child pornography, but the provenance of that designation is unknown. So, a match alone indicts a file as contraband but cannot alone convict it.").

¹¹⁶ *Id.* at 40.

¹¹⁷ *Id.*

However, because NCMEC – and not AOL – opened the email, the Court also analyzed NCMEC’s role. For NCMEC, the Court reached the opposite conclusion and found the nonprofit to be a government agent. NCMEC’s CyberTipline operation, the Court reasoned, “is intended to, and does, serve the public interest in crime prevention and prosecution, rather than a private interest.”¹¹⁸ Key to the Court’s ruling is that NCMEC receives funding from the federal government with the specific purpose of operating the CyberTipline,¹¹⁹ and federal law requires service providers to report apparent child pornography to NCMEC.¹²⁰

Courts’ determinations of a private actor’s intent often rely primarily on how the private parties justify their actions in declarations or suppression hearing testimony. For instance, in *United States v. DiTomasso*,¹²¹ the Court concluded that chat provider Omegle was not a government agent or instrument when it scanned user content for illegal content because the company’s founder stated that it monitored chats as “an effort to improve the user experience by removing inappropriate content from the site” due to “negative media attention” that anonymous chat services received for inappropriate content.¹²² The Court reasoned that there “is no direct evidence to support the proposition that Omegle intended its monitoring program to assist law enforcement.”¹²³

Not all courts focus primarily on the subjective intent of the private party. For instance, in *Drivdahl*,¹²⁴ in which the Court only analyzed Google’s status because the Google employee opened the email before sending it to NCMEC, the Court applied the two-part *Walther* test. However, the *Drivdahl* Court focused primarily on the first prong – “whether the government knew and acquiesced in the intrusive conduct,” and determined that “the government was not involved directly or indirectly as a participant or encourager, nor did it

¹¹⁸ *Id.* at 41.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *United States v. DiTomasso*, 81 F. Supp. 3d 304 (S.D.N.Y. 2015).

¹²² *Id.* at 307.

¹²³ *Id.* at 309-10.

¹²⁴ *United States v. Drivdahl*, CR 13-18-H-DLC, 2014 U.S. Dist. LEXIS 29233, *4 (D. Mont. Mar. 6, 2014).

have any degree of knowledge or acquiescence.”¹²⁵ The Court concluded that because “there is nothing in the record to suggest that law enforcement agents were involved in the search or investigation” until after Google filed the NCMEC report, it was unnecessary to consider Google’s subjective intent.¹²⁶ This focus on the government’s involvement in the private search provides a more objective and predictable measure than an analysis that attempts to predict the motivations of the private party that is conducting the search. However, the *Drivdahl* framework is an outlier in the Fourth Amendment opinions, particularly in online child pornography cases challenging searches by service providers and NCMEC.

This hyper-focus on private party intent is particularly clear in then-Judge Gorsuch’s opinion in *Ackerman*, which concluded that NCMEC was both a government entity *and* a government agent. Applying the Tenth Circuit’s iteration of the *Walther* test, Judge Gorsuch quickly concluded that the government “knew of and acquiesced in” NCMEC’s search, relying primarily on the statutory child pornography reporting requirements:

Here we know Congress statutorily required AOL to forward Mr. Ackerman's email to NCMEC; Congress statutorily required NCMEC to maintain the CyberTipline to receive emails like Mr. Ackerman's; Congress statutorily permitted NCMEC to review Mr. Ackerman's email and attachments; and Congress statutorily required NCMEC to pass along a report about Mr. Ackerman's activities to law enforcement authorities. All at the government's expense and backed by threat of sanction should AOL have failed to cooperate. All with special dispensation, too, to NCMEC to possess and review contraband knowingly and intentionally. This comprehensive statutory structure seems more than enough to suggest both congressional knowledge of and acquiescence in the possibility that NCMEC would do exactly as it did here.¹²⁷

¹²⁵ *Id.* at *8.

¹²⁶ *Id.* *8-9.

¹²⁷ *United States v. Ackerman*, 831 F.3d 1292, 1301-02 (10th Cir. 2016).

Judge Gorsuch acknowledged that no statute *requires* NCMEC to open and view emails, but he reasoned that “Congress has authorized and funded NCMEC to do just that. And everyone accepts that Congress enabled NCMEC to review Mr. Ackerman’s email by excepting the Center from the myriad laws banning the knowing receipt, possession, and viewing of child pornography.”¹²⁸ Therefore, he reasoned, “[n]othing about NCMEC’s actions could possibly have come as a surprise.”¹²⁹

The flaw in Judge Gorsuch’s analysis is that, rather than considering the government’s knowledge and acquiescence in the specific search of Ackerman’s email, Judge Gorsuch concluded that the first prong of the agency test was satisfied merely because the government knew of the general *possibility* of an individual’s email being searched by NCMEC. This is less precise than the analysis in *Drivdahl*, which focused on whether the government had any specific involvement with the search of the defendant’s email. *Ackerman* demonstrates that even the first factor of the *Walther* test – which is less subjective than the second factor – may ultimately be decided by a judge’s guess as to the intent of the government. This interpretation of the first prong entirely overlooks whether the government *actually* had any control or oversight of the private party search.

As to the second prong of the *Walther* test – the intent of the private party, Judge Gorsuch stated that “we harbor no doubt” about NCMEC’s intention to assist law enforcement.¹³⁰ “Congress authorizes and funds NCMEC to perform the functions it performed here because (and expressly premised on the finding that) they are designed (intended) to help law enforcement,” Gorsuch reasoned.¹³¹ Gorsuch similarly relied on NCMEC’s website, which stated that the nonprofit provides “assistance to law enforcement and families to find missing children, reduce child sexual exploitation and prevent child victimization.”¹³²

Although that may be one of the goals as stated on NCMEC’s website, it is not the only goal. For instance, on its annual filing with

¹²⁸ *Id.* at 1302.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

the Internal Revenue Service, NCMEC states that its “mission or most significant activities” is “operate national clearinghouse on missing and sexually exploited children, assist efforts to find missing children and reduce child exploitation.”¹³³ Indeed, the federal statute that provides grants for part of NCMEC’s budget authorizes 22 programs, many of which have nothing to do with assisting law enforcement.¹³⁴ Among those duties are operating a 24-hour telephone line for people to report sightings of missing children,¹³⁵ and coordinating programs to reunite missing children with their families,¹³⁶ NCMEC’s ultimate goal is to reduce harm to children. Assisting law enforcement may very well be one of the tools that NCMEC uses to accomplish that goal, but such assistance is only a means and not an end.

The imprecise application of the second prong of the *Walther* test to *Ackerman* and other child pornography cases evinces the difficulty of conducting subjective assessments of intent. Judge Gorsuch may well have been correct that NCMEC intends to help law enforcement. However, NCMEC also intends to help children. Similarly, a service provider may implement hash scanning for a number of business reasons such as creating a safe environment for its consumers and protecting its brand image. However, that same service provider also may partly be motivated by societal concerns, including promoting children’s welfare and assisting law enforcement in preventing child pornographers from repeating their crimes. Indeed, every private actor may well have a number of reasons for conducting a search. Assigning a single motive to any individual or organization is reckless, particularly when the outcome of that analysis could determine whether a criminal defendant stands trial for child exploitation. Technology companies, NCMEC, prosecutors, and criminal defendants need a more reliable and less erratic test to determine when a warrant is needed before conducting a search.

The NCMEC cases demonstrate the practical limits of fairly applying the *Walther* state agency test. Courts too frequently attempt

¹³³ Grant Thornton LLP, *Form 990 for the fiscal year ending Dec. 31, 2015*, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, http://www.missingkids.com/content/dam/ncmec/en_us/documents/form9902015.pdf [<https://perma.cc/6QWC-EZ5G>].

¹³⁴ 34 U.S.C. § 11293.

¹³⁵ 34 U.S.C. § 11293(b)(1)(A).

¹³⁶ 34 U.S.C. § 11293(b)(1)(D).

to guess the extent of law enforcement's knowledge of whether the service provider or NCMEC is conducting a warrantless search. And more troublesome, the courts struggle to discern the motives of service providers and NCMEC, when in reality they may have a number of intentions, some related to helping law enforcement, some related to preventing child exploitation generally, and some related to their own business interests. The malleable, subjective test leaves too much uncertainty for service providers and NCMEC, and threatens to undermine a system that has been highly successful in combatting online child exploitation.

B. *Computer Repair Shops*

Fourth Amendment agency issues also arise when computer repair technicians incidentally discover child pornography or other illegal content on a customer's computer and then report it to law enforcement. Although such cases do not present the same complex statutory requirements as the NCMEC reporting cases, the repair cases demonstrate similar flaws in the prevailing Fourth Amendment agency tests.

For instance, in *United States v. Grimes*,¹³⁷ Kevin Watson, a computer store employee, was repairing Jeffrey Grimes's computer, which would not function properly.¹³⁸ Watson noticed that the hard drive had little remaining space, so he called Grimes to suggest that he allow Watson to remove unnecessary files.¹³⁹ Watson could not reach Grimes, but Grimes's wife gave him permission to delete the files.¹⁴⁰ Before deleting a file, Watson would open the file to ensure that they were temporary images for websites or other files that did not belong to the computer owner.¹⁴¹ During this review, Watson discovered approximately seventeen images that appeared to be child pornography.¹⁴² Watson's supervisor called a police detective, who

¹³⁷ *United States v. Grimes*, 244 F.3d 375 (5th Cir. 2001).

¹³⁸ *Id.* at 377.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 378.

¹⁴² *Id.*

viewed the seventeen images and then called the Federal Bureau of Investigations.¹⁴³ The FBI used this information to obtain a search warrant to review the entire computer.¹⁴⁴ A jury convicted him of possession of child pornography.¹⁴⁵

On appeal, Grimes alleged a number of legal errors, including the district court's refusal to suppress the computer evidence on Fourth Amendment grounds.¹⁴⁶ Applying the *Walther* test, the Fifth Circuit first reasoned that "the government was not involved in the initial discovery of the images."¹⁴⁷ As to the second inquiry regarding the repair shop employees' intent, the Court summarily concluded that "when the private parties initially discovered the images, they did not act with the intent to assist law enforcement officials."¹⁴⁸ The Court acknowledged, again without pointing to any evidence, that the employees "did, however, intend to aid officials after the discovery of the images and their initial belief in the images' illegality, but this is a different inquiry."¹⁴⁹

The practical problem with this analytical framework is that it could just as easily lead to a conclusion that Watson and his supervisor acted as government agents. The Court acknowledged that the first prong of the *Walther* test, which is binding in the Fifth Circuit, is "whether the government knew or acquiesced in the intrusive conduct."¹⁵⁰ The Court did not directly address whether the FBI knew of or acquiesced in the shop's search, and instead merely noted that the government "was not involved" in the initial search. That is a very different inquiry than whether the government knew of or acquiesced to the search. It is understandable that the Court avoided the actual first prong as provided in *Walther*. Whether the police knew of *or* acquiesced to the computer shop's search is not a

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 378.

¹⁴⁵ *Id.* at 377.

¹⁴⁶ *Id.* at 383.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

useful inquiry. At the time of Watson's initial repair of the computer, the police may not have known of Watson's specific decision to open Grimes's computer files. However, the police may have known generally that computer repair shops open their customers' files; indeed, Watson's supervisor knew to call a police detective upon discovery of the image. Similarly, did the police "acquiesce" to the search? Arguably, they did so when they used the fruits of Watson's search to obtain a search warrant for the entire computer. The Court likely would respond that its inquiry is limited to whether the government acquiesced *at the time of the search*, but nothing in *Walther* or its progeny in other circuits limits the analysis. Webster's dictionary defines "acquiesce" as "accept, comply, or submit tacitly or passively,"¹⁵¹ and there is a reasonable argument that law enforcement's decision to rely on evidence obtained in a private party's search constitutes acquiescence. The Fifth Circuit took the more rational path for the first prong of the agency test by overlooking the knowledge-or-acquiescence test and focusing on the actions of the police.

The second prong of the agency test, as applied in *Grimes*, was equally problematic. The Court summarily concluded that Grimes failed to satisfy the intent requirement of the agency test because, at the time of the initial search, Watson did not intend to help the police. Such a finding is arbitrary. Based on the record before the Court, it is impossible to be reasonably certain of the intent of Watson at the time that he opened the image. Although he testified that he opened the images before deleting them to make sure that they are not "personal," it is impossible for the Court to know with a reasonable degree of certainty whether that was Watson's only motive for opening the images. Did he also want to ensure that his customers were complying with the law? The Court has no choice but to rely on Watson's testimony about his internal thought process.

The *Grimes* case demonstrates the practical difficulties with applying the prevailing *Walther*-based test for government agency. Both factors are arbitrary and do little to inquire as to the *actual* behavior of the police and private parties. The Fifth Circuit likely reached the right conclusion in this case, as the police and FBI were not involved in the initial search based on the evidence in the record. However, the two-part *Walther* analysis is ill-equipped to reach that

¹⁵¹ See, *Acquiesce*, MERRIAM-WEBSTER'S DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/acquiesce> [<https://perma.cc/5VKX-NWM4>].

conclusion. Applying that test, a Court reasonably could have decided that Watson acted as a government agent.

The impossibility of applying a fair subjective intent-based agency test can be seen when examining cases in which private parties take numerous steps to help law enforcement. For instance, in *United States v. Hall*,¹⁵² the Seventh Circuit refused to suppress evidence of child pornography that was detected in a computer repair shop. Much more so than *Grimes*, the repair technician in *Hall* worked with law enforcement during the investigation.

Jesse Kevin Hall brought his computer to a repair shop, CDS.¹⁵³ To fix the computer's problems, CDS technician Richard M. Goodwin reviewed file directories, and noticed filenames that implied that they contained child pornography.¹⁵⁴ Goodwin opened and viewed some of the files and determined that they did, in fact, contain child pornography.¹⁵⁵ When Hall called Goodwin to ask when his computer would be repaired, Goodwin did not tell Hall about the images that he discovered.¹⁵⁶ Instead, Goodwin told Hall that the computer required a video upgrade to function correctly.¹⁵⁷ Goodwin then called a friend at the state police, Trooper Wayne Johnson, and described the images that he found on Hall's computer.¹⁵⁸ Johnson instructed Goodwin to copy the files onto a floppy disk for evidence preservation. Goodwin provided the disk to Johnson, but no law enforcement officer ever viewed the disk's contents.¹⁵⁹ Instead, Johnson contacted another state police colleague, who contacted the FBI.¹⁶⁰ The FBI interviewed Goodwin, who, along with his CDS coworkers, Warren Wilson and

¹⁵² *United States v. Hall*, 142 F.3d 988 (7th Cir. 1998).

¹⁵³ *Id.* at 990-91.

¹⁵⁴ *Id.* at 991.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

Bruce Egolf, agreed to help the FBI investigate Hall.¹⁶¹ After meeting with the FBI, Wilson called Hall to tell him that the video upgrade would not be finished until the next week, and Egolf, locked the computer in his office as the FBI investigated.¹⁶² The FBI obtained warrants to search Hall's home and computer based on affidavits that described Goodwin's statements to law enforcement and Johnson's instructions for Goodwin to preserve the evidence on a floppy disk, though the affidavits did not rely on the files that Goodwin copied.¹⁶³

Although the computer upgrade had been completed the same day that the warrant issued, Wilson retained the computer for another day so that an FBI expert would be available to review the files on the computer. The next day, when Hall picked up his computer from CDS, FBI agents executed the warrant and seized the computer.¹⁶⁴ After the agents informed him of the investigation, Hall admitted that he had obtained child pornography online and provided consent for a search of his home and computer.¹⁶⁵ Hall was indicted for knowingly possessing child pornography, and moved to suppress all evidence, which he argued stemmed from the initial warrantless search by Goodwin, who acted as a government agent.¹⁶⁶ The district court denied his suppression motion, and Hall entered a conditional guilty plea, allowing him to appeal the suppression order.¹⁶⁷

On appeal, the Seventh Circuit affirmed the district court, agreeing that Goodwin conducted the search as a private actor and not a state agent.¹⁶⁸ To reach this result, the Seventh Circuit applied its version of the agency test, which relies primarily on the two *Walther* factors, but also considers whether the Government offered a reward to the private party.¹⁶⁹ For the first *Walther* factor, the Court reasoned that

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 992.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 993.

¹⁶⁹ *Id.*

the government “had no knowledge that Goodwin was going to repair Hall’s computer and thus, did not instruct Goodwin to inspect the files.”¹⁷⁰ As in *Grimes*, the Seventh Circuit attempted to look beyond *Walther*’s focus on knowledge and acquiescence of the government, and focus instead on whether the government took any affirmative steps to instigate or control the search.

As to the intent requirement, the Seventh Circuit reasoned that Goodwin initiated the search as part of “the normal course of CDS’s business, with the sole purpose of testing Hall’s [computer],” and that he contacted the government only after discovering the evidence.¹⁷¹ The Court’s analysis of intent overlooked a key fact: Goodwin initially only saw suspicious file names as he was repairing the computer. Nothing in the case record indicates that he had any legitimate business need to open the files to determine whether they were, in fact, child pornography. A search occurred not only when he opened the file directory to view the file names, but also when he took the next step to open and view the image. Although there might be other explanations for Goodwin’s motivations to open the files, intending to aid law enforcement is a likely explanation. Had the Seventh Circuit correctly applied the *Walther* analysis, it is difficult to see how the Court could have avoided a finding that Goodwin acted as an agent of law enforcement.

That is not to say that the courts in *Grimes* and *Hall* reached the incorrect conclusion regarding Fourth Amendment agency status. Indeed, if the courts had applied the objective test that I propose in Part IV, they likely would have concluded that the computer repair technicians were not agents or instruments of the government. However, the courts would have reached this conclusion not because of their guesses as to the intent of the technicians; rather, their ruling would be grounded in an objective observation of the government’s control over the search.

V. AN OBJECTIVE FRAMEWORK

To address the shortcomings of the *Walther* test, courts should adopt an objective agency-or-instrument analytical framework that is

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

consistent with Fourth Amendment jurisprudence and capable of being applied in a more consistent and predictable manner.

When a court is evaluating a search conducted by a private party, the court should conclude that the private party was an agent or instrument of the government only if it determines that the government exercised substantial control over the search. The court should make this determination based on an objective evaluation of the actions of the government. The agent-or-instrument analysis should not inquire as to the intent of either the private party or the government; rather the court should focus solely on the role that the government *actually* played in the specific search that is the subject of the Fourth Amendment challenge.

My proposed test draws on some existing Fourth Amendment agency doctrine. Although the *Walther* test does not address the objective actions of the government – other than whether the government “acquiesced,” the First Circuit’s test considers “the extent of the government’s role in instigating or participating in the search, its intent and the degree of control it exercises over the search and the private party, and the extent to which the private party aims primarily to help the government or to serve its own interests.”¹⁷² Although the final prong of the First Circuit’s analysis also incorporates the subjective elements of *Walther*, the First Circuit framework also considers the objective actions of the government. My proposed test distills the First Circuit’s inquiry into a wholly objective one and removes the *Walther* inquiry into intent of the private party or government.

The proposed objective framework is consistent with the Supreme Court’s directive in *Skinner* that agency hinges on “the degree of the Government’s participation in the private party’s activities.”¹⁷³ Unlike *Walther* and its progeny, an objective framework focuses on the *actual* role that the government played in a private party’s search, and not the motivation of the private party.

An objective analysis that focuses on the government’s actions also is consistent with the purpose of the Fourth Amendment exclusionary rule: deterring unconstitutional behavior by the government.¹⁷⁴ The

¹⁷² *Id.*

¹⁷³ *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 US 602, 614 (1989).

¹⁷⁴ See Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 256 (1961) (“If the tainted evidence is barred from trial, the prosecution will frequently fail to carry its considerable burden of proof. The aim

Supreme Court has long held that the exclusionary rule “is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”¹⁷⁵ By designating a private party an agent when the government substantially participates in a search, this analytical framework might deter the government from such participation. Under the current *Walther* framework, on the other hand, a court may designate a private party as a government agent – and as a result suppress the evidence in a criminal trial – merely because of the intent of the private party.

As applied to some of the recent Fourth Amendment agency cases, the objective test would provide more certainty and focus properly on the involvement of government in the search. For example, in the *Keith* and *Ackerman* cases, NCMEC likely would not be deemed an agent or instrument of the government under this proposed test. To understand why, it is important to first determine exactly *what* action is being analyzed for Fourth Amendment purposes. We are not analyzing the initial scan by the service provider. Nor are we analyzing NCMEC’s transfer of the email content to law enforcement. Instead, the Fourth Amendment analysis focuses on NCMEC’s search of the email, which consists of opening any emails that had not already been viewed by the service provider. The government plays no role in that action. Federal law does not require NCMEC to open the messages provided by the ISPs or take any other steps that would constitute a search. Federal law only states that NCMEC “shall forward each report” made by a service provider “to any appropriate [federal] law enforcement agency” and that it “may forward” any such report to a state or local law enforcement agency.¹⁷⁶ Nothing in the statute requires or even allows the government to participate in any review that NCMEC conducts.

Even under the objective test, a criminal defendant might argue that because the government provides funds to NCMEC, the

is to deter law enforcement officers from violating individual rights; however, the rule does not impose money damages or loss of liberty upon the offending officers, nor does it provide compensation for persons injured by official overreaching.”).

¹⁷⁵ *Elkins v. United States*, 364 U.S. 206, 217 (1960); *see also* *United States v. Calandra*, 414 U.S. 338, 348 (1974) (“In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”).

¹⁷⁶ 18 U.S.C. § 2258A(c).

government substantially participates in the nonprofit's activities and therefore NCMEC is a government agent or instrument. This argument is unavailing because the federal funding to NCMEC supports twenty-two programs, only some of which involve work with law enforcement. If NCMEC were to be held to be a government agent under these circumstances, any entity that receives federal funding also could be considered an agent or instrument of the government. The more appropriate inquiry is whether the government substantially participated in the search at issue in the suppression motion.

Likewise, under the objective framework, the courts in *Grimes* and *Hall* likely would conclude that the computer technicians were not government agents or instruments. Nothing in the record suggests that the government was involved whatsoever in the technicians' initial searches of the computers. This is the same conclusion that the courts reached by applying the *Walther* tests, but the analysis is more predictable and consistent with Fourth Amendment principles. Rather than attempt to guess the motivations of the individual technicians at the time that they performed the search, the courts can objectively assess the involvement of the government in the search.

That is not to say that the proposed agency test would always result in a conclusion that private parties are not agents or instruments of the government. If the state police or FBI had specifically requested that NCMEC search Keith's or Ackerman's email, then a court could easily conclude that NCMEC acted as an agent or instrument of the government. Likewise, if law enforcement provided technical assistance to NCMEC as it reviewed the emails, a court likely would conclude that NCMEC is a government agent or instrument under the objective test.

The objective framework also could result in a finding that an email or cloud provider acted as a government agent when scanning accounts for hash values. This finding, however, only would occur if law enforcement was encouraging or assisting in the initial scanning. Accordingly, an objective framework would discourage such collusion between service providers and law enforcement.

In the computer technician cases, if law enforcement officers continuously work with the technicians and instigate or assist their searches of customers' computers, the technicians likely would be considered government agents under the proposed objective test. For instance, in criminal child pornography case that is pending before the United States District Court for the Central District of California,¹⁷⁷

¹⁷⁷ United States v. Rettenmaier, Case No. SA CR 14-0188 CJC (C.D. Cal. Nov. 27, 2017).

defendant Mark Rettenmeier moved to suppress alleged child pornography files that a Best Buy repair technician discovered on his computer and reported to the FBI. Unlike many of the other child pornography/computer repair Fourth Amendment cases, the technician in this case is alleged to have a “continuing and close relationship” with an FBI special agent, including periodic check-ins by the agent.¹⁷⁸ The defendant also alleged that one of the Best Buy employees is a paid FBI informant.¹⁷⁹ Such facts, under an objective agency test, would strongly weigh in favor of a finding that the Best Buy technician was a government agent or instrument. The government was actively involved and encouraged the searches to occur. This is far different than the government taking a passive position and merely accepting tips from outside parties. Ultimately, however, the Court dismissed the indictment on other grounds, due to the FBI’s alleged misstatements on a later search warrant.

VI. CONCLUSION

The Fourth Amendment exists to restrict government actions. But when the government works closely with a private party to conduct a search, it is not always clear whether the Fourth Amendment should even apply. This dilemma has only increased for courts in recent years as computer crime cases have proliferated, and online platforms and service providers often are the first to discover evidence of a crime. A determination that the private party is subject to the Fourth Amendment could lead to the suppression of the evidence and, ultimately, dismissal of the charges. Therefore, it is essential that the framework for evaluating whether a private party is an agent or instrument of the government be fair, predictable, and, most importantly, consistent with the Supreme Court’s Fourth Amendment jurisprudence. Unfortunately, the prevailing agency test applied by most lower courts meets none of those requirements. The current focus on the intent of the private parties is difficult to predict with certainty, subject to the arbitrary whims of a court, and inconsistent with the fundamental principles of the Fourth Amendment. This

¹⁷⁸ Motion to Suppress at 80, *United States v. Rettenmaier*, Case No. SA CR 14-0188 CJC (C.D. Cal. Oct. 30, 2015).

¹⁷⁹ Reply Brief at 221, *United States v. Rettenmaier*, Case No. SA CR 14-0188 CJC (C.D. Cal. Apr. 10, 2017).

Article has proposed an objective agency test that focuses on the actions of the government rather than the intent of private parties.

